SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. ~~1881~~ 70-78

AFFILIATED UTE CITIZENS OF THE STATE OF UTAH, an unincorporated association formed by and under the supervision of the Secretary of the Department of the Interior pursuant to Public Law 83-671 (25 U.S.C. §§ 677-677aa) composed of 490 so-called "mixed-blood" members of the Ute Indian Tribe of the Uintah and Ouray Reservation, Utah, suing on its own behalf and as representative for and on behalf of its 490 members and their heirs and legal representatives as a class; and the 490 so-called "mixed-blood" members of the Ute Indian Tribe of the Uintah and Ouray Reservation, Utah, individually and as an identifiable Indian group or band.

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondents.

ANITA REYOS, *et al.*,

Petitioners,

vs.

FIRST SECURITY BANK OF UTAH, N.A., UNITED STATES OF AMERICA, JOHN B. GALE AND VERL HASLEM,

Respondents.

REPLY BRIEF FOR PETITIONERS

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No. 1331

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REPLY BRIEF FOR PETITIONERS

This Reply Brief is respectfully submitted for Petitioners in response to new points raised for the first time in the Brief for the United States in Opposition, pursuant to the provisions of Rule 24-4.

ARGUMENT

I

TERMINATION OF THE AFFILIATED UTES *PROPERTY* DID NOT OCCUR ON AUGUST 27, 1961

For the first time, the United States has asserted that termination of the *property* which was to be divided under the Act was on August 27, 1961. (Br. of U.S., p. 4) In the courts below, the United States consistently took the position that only termination of the *person* occurred on that date, and that supervision over the real property continued until August 27, 1964. The difference is important because it denies the "limited aspects of the federal trust relationship" which the trial judge found continued until the latter date and upon which he based liability. (App. 81, 91)

The position taken by the United States cannot be reconciled with the language of the Act. At page 20 of the Petition we discussed the language of 25 U.S.C. § 6770 which *excepts* real property from the removal of restrictions on August 27, 1961. There are, however, other provisions of the statute and regulations which negate the conclusions of the United States.

See, in particular, 25 C.F.R. 243.2(h) (App. 144):

> "'Termination of Federal supervision' means termination of Federal supervision over the particular real estate involved . . . *and does not mean termination of the wardship relationship between the Indian and the United States on the occasion of the issuance of a so-called 'Termination Proclamation'* (25 U.S.C. 677v)." (emphasis added).

In the trial court, the United States attempted to avoid the clear implications of the statutory language by urging that the Secretary, somehow, without statutory authority, converted the real property into personalty by delivering it to the corporation, UDC. The argument was obviously frivolous and was rejected by the trial judge.

The issue is of great importance to all Indians. Indeed, the Association on American Indian Affairs, Inc., the largest non-profit association representing American Indians, filed a brief *amicus curiae* in the trial court to urge the importance of the issue to the Indian community in general. Since substantially the same issue is now raised in a new form, we reproduce the brief filed by the Association on this important question for the convenience of the Court, as Appendix G. As the Association observed:

> "This Court needs no citation for the principle that persons may be the beneficiaries of trust property without otherwise being subject to legal disability. . . . The law is equally clear that, if Congress so provides, as was done in this case, some aspects of the Federal trust relationship can survive a general termination statute . . . ." (App. G, iv)

II

JURISDICTION IS NOT CONTINGENT UPON A CLAIM OF "POSSESSION"

A second point raised in the Brief of the United States in Opposition which is entirely new, never having been asserted in the courts below, is that there is no jurisdiction under 25 U.S.C. § 345 to enforce the grants of interests in land, in the nature of minerals, assured under the Act because "petitioners are not seeking 'possession' of any parcel of land to which they are entitled." (Br. of U.S., p. 7).

The answer to this argument is contained in the language of the statute itself, pertinent provisions of which are quoted in the margin at page 9 of the Petition. The jurisdictional grant refers to several different interests in land, but significantly the term "possession," which the United States now suggests as an indispensable element, is not employed anywhere in the statute. Surely the real property owned by the Indians is a "parcel of land," and the terminated Utes clearly claim to be "lawfully entitled by virtue of any Act of Congress" — *viz.*, the termination act. The AUC claim is, therefore, within the plain language of the jurisdictional grant.

Again, the issue is of profound importance to all American Indians. Surely Congress never intended to guarantee the terminated Utes important property rights and yet deny the federal courts power to enforce them. If the provisions of 25 U.S.C. § 345 relate only to conventional allotments, as the United States has suggested, the section has been effectively repealed, for the allotment system is no longer in effect.

The dimensions of the tragedy in the lives of the terminated Utes is measured by a comparison of the assertion that "[n]o one questions the rights of the Affiliated Ute Citizens to their 27 percent beneficial interest in the minerals of the reservation" (Br. of U.S., p. 7) with the recital of the formation of the Corporation. (Br. of U.S., p. 3) There is no statutory authority for the formation of the Corporation,* and the United

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* 25 U.S.C. §677l (3) (App. 136) permits the organization of corporation to handle grazing rights and water rights, but does not mention mineral rights. 25 U.S.C. §677l (2) (App. 135) indicates that a corporation may not be formed to handle mineral rights. 25 U.S.C. §677e (App. 128) declares that the "authorized representative" which was to represent the terminated Utes in relation to the mineral rights was to be formed pursuant to a "constitutional and bylaws," rather than a corporate charter. It seems rather clear, therefore, that the Act did not contemplate handling of the mineral rights by a corporation.

States refers to none. Yet, because the stock of the majority of terminated Utes was acquired by fraud, and the United States refused to prevent the fraud by requiring compliance with the Act, the corporation is now owned by non-Indians. Thus, the United States may not question the beneficial rights of the terminated Utes, but just as surely it is delivering those rights to persons it acknowledges to be without any proper claim, and defiantly denies that it should be required to account for its conduct. If such conduct is condoned, the plight of the terminated Utes is most surely the plight of the entire Indian community in microcosm.

This attitude of the United States is perplexing, for considering the disclaimer of any interest in the 27 percent of the minerals, the delivery of them to the terminated Utes which is sought by AUC would not result in any loss to the United States of any sort.

Finally, the conclusory note of the United States that the special problems of this case will not arise again is speculation at best, and demonstrably false. The present Congress and Administration have, to be sure, recognized the tragedy of termination and issued statements renouncing the policy. It must be considered, however, that termination is but a revival of the earlier allotment policy which has been with us in many different forms for over a hundred years. Thus, the prospect is that the policy will yet crop up again, though perhaps as another variation of what is a worn and discarded idea. Even if it does not, however, the devestating effects of the policy are very real in the lives of many thousands of Indians. That fact alone is sufficiently important to justify the guidance of this Court in construing these laws.

CONCLUSION

Because of the importance of the questions presented to all American Indians, both terminated and non-terminated alike, certiorari should be granted. The views of important Indian representatives, such as the Association on American Indian Affairs, Inc., should also be considered.

Although this brief does not reply to the arguments of the bank and the other defendants, who the trial judge concluded were guilty of fraud, we do not ignore the fact that it is their conduct which is the principal cause of the injury to the terminated Utes. The United States was merely negligent in failing to prevent the fraud of others. The arguments of the other parties are arguments of law to which no reply is appropriate at this time.

It is worthy of note, however, that the defendant's position that a formalistic restriction of the protections of the securities laws is not a matter of sufficient importance to merit the attention of this Court does not represent the view of the Securities and Exchange Commission in briefs recently filed with this Court* in a case involving the takeover of an insurance com-

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* See *Manhattan Casualty Company* v. *Bankers Life and Casualty Co.*, docket no. 1159 (Supreme Court of the United States, October Term, 1970). In its brief in support of the petition in the *Bankers Life* case, SEC said:

> "by the enactment of Section 10(b) Congress intended to prevent inequitable and unfair practices and to ensure fairness in securities transactions generally, whether conducted in the organized securities markets or face-to-face.
>
> ". . . As the Senate Committee stated, 'Motive furnishes no justification for the employment of manipulative or deceptive devices.'" (citations omitted)

SEC explained that section 10(b) of the Securities Exchange Act "was intended to be as broad as the Act itself, serving to fill any gaps left by more specific provisions in preventing 'cunning devices,'" and that this Court should consider such a question because:

pany. Banking and insurance represent the two major areas of claimed exemption from securities laws, which have been the subject of constant litigation. For that reason, we urge that the views of SEC also be solicited on the important issues presented by this case.

Respectfully submitted,

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"The rule of law established by the court below poses a serious threat to these antifraud provisions by formalistically and narrowly defining and severely circumscribing, the scope of the securities transactions to which they apply."

In the *Bankers Life*, case the "formalistic" and narrow construction was one which denied application of the Rule to fraud associated with acquisition of an insurance company. In AUC, the formalistic construction eliminates banking transactions from the purview of the rule.

APPENDIX G

AMICUS CURIAE BRIEF OF THE ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

REYOS, et al.,

Plaintiffs,

v.

FIRST SECURITY BANK OF UTAH, et al.,

Defendants.

Civil No. C-39-65

BRIEF OF ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC., AS AMICUS CURIAE

STATEMENT

Under the Act of August 27, 1954, 68 Stat. 868, 25 U.S.C. 677 *et seq.* (also known as Public Law 671), Congress authorized, *inter alia*, the partition and distribution of the assets of the Ute Indian Tribe of the Uintah and Ouray Reservation in Utah, and further provided for the termination of Federal supervision over the trust and restricted property of the so-called "mixed-blood members" of the Tribe. Congress recog-

nized, of course, that certain assets of the Ute Indian Tribe could not physically be divided or even accurately be identified. According, Section 10 of the 1954 Act, 25 U.S.C. 677i, directed in part:

> "All unadjudicated or unliquidated claims against the United Staes, all gas, oil, and mineral rights of every kind, and all other assets not susceptible to equitable and practicable distribution shall be managed jointly by the Tribal Business Committee [full-bloods] and the authorized representatives of the mixed-blood group, subject to such supervision by the Secretary as is otherwise required by law. . . ."

Pursuant to Section 23 of Public Law 671, 25 U.S.C. 677v, the Secretary of the Interior eventually published in the *Federal Register* a proclamation declaring that the Federal trust relationship to each mixed-blood Ute was terminated as of August 27, 1961. Prior to the effective date of this proclamation, however, the mixed-blood group had designated as its authorized representative under Section 10 for managing unliquidated, undivided and undistributed tribal assets the Ute Distribution Corporation, a corporation duly organized under the laws of the State of Utah, and had assigned such assets to the corporation in exchange for ten (10) shares of stock therein per member. Plaintiffs in this case are mixed-blood Utes who transferred their stock in the corporation to non-Utes after August 27, 1961, and prior to August 27, 1964, the first date when interests in tribal assets no longer had to be offered to other members of the tribe before sale to non-members. See Section 15 of the 1954 Act, 25 U.S.C. 677n.

One of the questions facing this Court is whether stock of the Ute Distribution Corporation was trust or restricted property subject to the supervision of the Secretary of the Interior during the period August 27, 1961 to August 27, 1964, and it is to that single issue of Indian law that this brief is addressed.

ARGUMENT

Stock of the Ute Distribution Corporation Is Trust or Restricted Property Subject to the Supervision of the Secretary of the Interior

Defendants in this case apparently are contending that the stock of the Ute Distribution Corporation lost its character as trust or restricted property on August 27, 1961 – the effective date of the Secretary's proclamation pursuant to Section 23 of the 1954 Act, 25 U.S.C. 677v, declaring that the Federal trust relationship to the mixed-blood Utes had been terminated, that such individuals no longer would be entitled to any special services for Indians and that the statutes of the United States which affect persons because of their status as Indians no longer would be applicable to them. This thesis is inconsistent with the very terms of the 1954 Act. Specifically, Section 16 of Public Law 671, 25 U.S.C. 677o, expressly provides that, upon the happening of certain events:

> ". . . the Secretary is authorized and directed to immediately transfer to him unrestricted control of all other property held in trust for such mixed-blood member by the United States, and shall further remove all restrictions on the sale or encumbrance of trust or restricted property owned by such member of the tribe, and Federal supervision of such member and his property shall thereby be terminated, *except as to his remaining interest in tribal property in the form of any unadjudicated or unliquidated claims against the United States, all gas, oil, and mineral rights of every kind, and all other tribal assets not susceptible to equitable and practicable distribution, all of which shall remain subject to the terms of this Act, notwithstanding anything herein contained to the contrary.*" (Emphasis supplied.)

In short, Congress excepted certain unliquidated, undivided and undistributed tribal assets from the scope of the termination proclamation, and the interest of each mixed-blood Ute in such assets was (and is) represented by his stock in the Ute Distribution Corporation.

The conclusion that Ute Distribution Corporation stock remains trust or restricted property subject to the supervision of the Secretary of the Interior even after the special Federal relationship to its owner is terminated finds support in other provisions of Public Law 671. As previously noted, Section 10 of the 1954 Act, 25 U.S.C. 677i, directs that the management of unliquidated, undivided and undistributed tribal assets shall be "subject to such supervision by the Secretary as is otherwise required by law," which, in the case of oil, gas and other minerals, for example, would mean Secretarial approval of any leases pursuant to 25 U.S.C. 396a *et seq.* Section 15 of the 1954 Act, 25 U.S.C. 677n, requires any mixed-blood Ute who desires to dispose of his interest in tribal assets before August 27, 1964, first to offer that interest for sale to other members of the tribe.[1] Most important, by the Act of September 25, 1962, 76 Stat. 597, approved over a year after the date of termination for the mixed-blood Utes, Congress amended Section 10 of Public Law 671, 25 U.S.C. 677i, to provide that the stock of Ute Distribution Corporation "shall not be subject to mortgage, pledge, hypothecation, levy, execution, attachment or other similar process, while such stock remains in the own-

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[1] Although the statute here speaks of "real property" and "a convenant to run with the land" (25 U.S.C. 677n, Article VIII of the Ute Distribution Corporation Articles of Incorporation similarly provides that "If any stockholder who is a member of the mixed-blood group of said Ute Indian Tribe determines to sell or dispose of his stock in this corporation at any time prior to August 27, 1964, he shall first offer it to the members of the tribe. . . ." This stipulation, moreover, is embodied in the Secretary's regulations relating to the sale of Ute Distribution Corporation stock. 25 CFR 243.12.

ership of the original stockholder or his heirs or legatees. . . ." In the light of these statutory conditions, stock of the Ute Distribution Corporaiton owned by mixed-blood Utes hardly can be characterized as unrestricted or otherwise free from Federal supervision.[2]

This Court needs no citation for the principle that persons may be the beneficiaries of trust property without otherwise being subject to legal disability. The sole question that remains, therefore, is whether the broad language of Section 23, 25 U.S.C. 677v, declaring that the "Federal trust relationship to such individual is terminated" as a matter of law served to end that relationship not only with respect to the person of each mixed-blood Ute, but also with respect to property (stock) which otherwise would have remained subject to a trust under other provisions of the 1954 Act. The law is clear that Congress has the exclusive power to determine when, how and by what steps special Federal responsibilities towards Indians are to be ended, and whether such emancipation shall be complete or only partial. *Creek County* v. *Seber*, 318 U.S. 705, 718 (1943); *United States* v. *McGowan*, 302 U.S. 535, 538 (1938); *United States* v. *Nice*, 241 U.S. 591, 698 (1916). The law is equally clear that, if Congress so provides, as was done in this case, some aspects of the Federal trust relationship can survive a general termination statute such as Public Law 671 and like

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[2] Indeed, each certificate of Ute Distribution Corporation stock carries the following Notice of Restriction on Transfer":

> "Transfer of this certificate at any time prior to August 27, 1964, to a person not a member of the Ute Indian Tribe of the Uintah and Ouray Reservation, Utah, as defined in Public Law 671-83rd Congress, approved August 27, 1954, 68 Stat. 868, shall be invalid unless the certificate of the Superintendent of the Uintah and Ouray Reservation is endorsed thereon showing that a prior and proper offer has been made to members of said tribe in accordance with law and the regulations of the Secretary of the Interior."

legislation passed in 1954. *Cain* v. *First National Bank*, 324 F. 2d 632 (9th Cir. 1963) and cases cited therein at page 536 (Klamath Tribe); *Menominee Tribe of Indians* v. *United States*, ... *F.* 2d .... (C. Cls. 1967). cert. granted .... U.S. .... (October 9, 1967).

CONCLUSION

In view of the foregoing facts and principles, the conclusion follows that stock of the Ute Distribution Corporation remained trust or restricted property subject to the supervision of the Secretary of the Interior even after August 27, 1961. The Association expresses no opinion at this time as to whether the Secretary's failure to protect mixed-blod Utes from improvident disposition of such stock constituted a violation of the Federal Tort Claims Act (*cf. Hatachley* v. *United States*, 351 U.S. 173 (1956)), or otherwise gave rise to a valid cause of action.

Respectfully submitted,

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